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October 19, 2004

VIA HAND DELIVERY

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
The Portals, 445 12th Street, S.W.
Room TW-A325
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: REDACTED INFORMATION – SUBJECT TO PROTECTIVE ORDER IN CC DOCKET NO. 01-338; WC DOCKET NO. 04-313

Dear Mrs. Dortch:

Pursuant to the Protective Order issued in CC Docket No. 01-338, WC Docket No. 04-313 released August 20, 2004, BellSouth submits two (2) copies of its redacted confidential filing to be included in the public record in the above referenced proceedings.

BellSouth is submitting under separate cover one (1) confidential copy which should receive all protection afforded to such information as set forth in the terms of the Protective Order.

Should you have any questions, please contact me.

Sincerely yours,

Bennett L. Ross

BLR:lb
Enclosures
552331/2

REDACTED INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 04-313 AND CC DOCKET NO. 01-338

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	

REPLY COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

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In the Matter of

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Obligations of Incumbent Local Exchange	)	
Carriers	)	

REPLY COMMENTS OF BELLSOUTH CORPORATION

BellSouth Corporation ("BellSouth"), for itself and its wholly owned affiliated companies, respectfully submits its reply comments in response to the *Notice*.[1]

I. INTRODUCTION

Although more than 80 parties responded to the Commission's *Notice*, many disregard, in whole or in part, the directives of the Supreme Court and the United States Court of Appeals for the D.C. Circuit in an attempt to perpetuate an unlawful unbundling regime at the expense of true facilities-based competition. Others fail to present evidence to support their positions, advocate for lengthy transition periods, or seek state commission involvement in an effort to achieve the same result, albeit indirectly. The Commission should reject such proposals and should, at the conclusion of this proceeding, articulate *and apply* a clear and lawful impairment standard. Only by specifying those network elements that meet this standard and identifying where such elements must be made available on an unbundled basis can the Commission bring certainty and

[1] *Unbundled Access To Network Elements; Review Of The Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, FCC 04-179 (rel. Aug. 20, 2004) ("*Notice*" or "*Interim Order*"). BellSouth includes with its Reply Comments supporting affidavits, some of which have exhibits, as well as an Appendix. Citations to this material will be to "BellSouth Reply App." or to the Affiant's last name and the relevant paragraph number and/or affidavit exhibit.

closure to an industry in desperate need of both. It is not sufficient to clarify tests that will be applied later, defer impairment determinations until additional data can be gathered, or tinker slightly with the *Triennial Review Order* framework that the D.C. Circuit has clearly rejected.[2]

II. SUMMARY

Competing Local Exchange Carriers ("CLECs") are not impaired without access to unbundled local switching. First, competitive circuit switching is abundant, and CLECs have been able to deploy numerous switches that are used to serve large geographic areas.[3] Second, intermodal alternatives are broadly available, serving both residential and business customers.[4] Despite the lack of impairment, certain commenters propose a number of schemes to perpetuate the continued availability of unbundled local switching – threshold tests, trigger tests, market-carve outs, and lengthy transitions -- but none has merit.[5]

CLECs are not impaired without unbundled access to high-capacity loops, transport, and dark fiber in central offices with 5,000 or more business lines. CLECs have deployed and continue to deploy extensive fiber optic networks through out the country. These competitive networks allow CLECs to self-provide loops and transport in significant quantities, not only in large cities but also in smaller cities with less population density.[6] BellSouth's market research

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[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 ("*Triennial Review Order*"), *corrected by Errata*, 18 FCC Rcd 19020 (2003), *reversed in part on other grounds, United States Telecom. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied, NARUC v. United States Telephone Ass'n,* Nos. 04-12, 04-15 & 04-18 (U.S. Oct. 12, 2004).

[3] *See infra* at pages 7-8.

[4] *See infra* at pages 9-10.

[5] *See infra* at pages 11-18.

[6] *See infra* at pages 24-25 & 30-31.

confirms that CLECs have a significant share of the high-capacity market, including services provided at the DS-1 level. Intermodal alternatives also are readily available, and cable modems are used extensively by both small and medium-sized business to meet their telecommunications needs.[7]

CLEC claims of impairment also ring hollow, given their extensive use of special access services. Carriers use special access with more frequency than unbundled DS-1 loops, and the data presented by BellSouth demonstrates that carriers have made and are making business decisions to serve particular customers with special access rather than DS-1 UNEs.[8] Although CLECs offer various excuses to explain these business decisions, they do not change the fact that carriers can compete effectively without access to unbundled high-capacity loops, transport, and dark fiber from BellSouth.[9]

A number of parties agree that impairment for certain high-capacity services should be assessed based on the concentration of business lines in a central office. BellSouth's proposal of 5,000 business lines as the demarcation point for finding non-impairment is supported by data that analyzes both actual and potential competition. The other proposals offered by the various parties are not supported by any data, and the purported rationale for these proposals – that self-deployment is only economic in the most-dense areas -- is contradicted by network deployment of a number of CLECs that filed comments in this proceeding. The reasonableness of the CLECs impairment proposals might have been verified had the CLECs provided detailed

[7] *See infra* at pages 24-27

[8] See infra at pages 45-46.

[9] *See infra* at pages 48-58

information about their network deployment, but, for whatever reasons, the CLECs elected not to do so.[10]

III. THE IMPAIRMENT STANDARD

A. Impairment Must Be Analyzed Based on Entry by a Reasonably Efficient Competitor.

There is nearly unanimous consensus that impairment must be analyzed based upon entry by a reasonably efficient CLEC.[11] However, while paying lip service to this standard, AT&T proposes that "the relevant inquiry must be carrier specific," which, according to AT&T, means that the fact that one carrier has deployed facilities does not mean that it would be economic for another carrier to do so.[12] AT&T's proposal must be rejected.

The notion that competitive entry should be judged on a carrier-by-carrier basis is both legally unsustainable and administratively unworkable. In fact, the Commission explicitly rejected this approach in the *Triennial Review Order*, finding that a focus on "individual requesting carriers" and their "particular business strateg[ies]" would "reward those carriers that are less efficient."[13] If an efficient carrier has deployed, for example, high-capacity facilities in a particular market, competition is possible without access to unbundled high capacity loops, transport, and dark fiber. Thus, there would be no basis for a finding of impairment even if

[10] *See infa* at pages 34-38.

[11] *See* PACE Comments at 33, CompTel/ASCENT Comments at 7, ATX/Blackfoot *et al.* Comments at 4, NTS Comments at 3 and Sprint Comments at 14.

[12] AT&T Comments at 14, 17-18.

[13] *Triennial Review Order*, 18 FCC Rcd at 17056-57, ¶ 115.

another carrier that is less efficient or has adopted a different business plan might desire to have unbundled access to such high capacity facilities.[14]

Furthermore, AT&T makes no attempt to explain how the "carrier specific" impairment standard could ever practically be administered. Even assuming AT&T's approach were lawful, which is not the case, there is simply no reasonable mechanism by which the Commission can judge whether competitive entry is economic on a carrier-by-carrier basis. AT&T's impairment proposal is nothing more than a request for maximum unbundling under a different name and should be summarily rejected.

The same is true for Alpheus's proposal that the test for impairment should "be measured in the context of a reasonably efficient competitor that does not own or control other network elements or rights-of-way."[15] This proposal is inconsistent with the concept of economic competitive entry and cannot be reconciled with *USTA II*. First, actual competitive entry by any means other than UNEs is conclusive evidence that such entry is economic and cannot simply be ignored as Alpheus proposes.[16] Second, the D.C. Circuit has required the Commission to consider competition through competing platforms in assessing impairment, including

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[14] AT&T conveniently overlooks the D.C. Circuit's directive that impairment cannot be established based upon a competitor's specific business plan or preferred technology. *See USTA v. FCC,* 290 F.3d 415, 429 (D.C. Cir. 2002) (*"USTA I"), cert. denied,* 538 U.S. 940 (2003) (finding "quite unreasonable" the Commission's position that its impairment inquiry could be limited to copper loop facilities by defining the service that a competitor seeks to offer as "DSL," as opposed to broadband); *USTA II,* 359 F.3d at 580 (affirming the Commission's determination that "intermodal competition in broadband, particularly from cable companies, means that, even if CLECs are unable to complete with ILECs in the broadband market, there would still be vigorous competition from other sources").

[15] Alpheus Comments at 80.

[16] *USTA II,* 359 F.3d at 592 (finding that the existence of competition by means other than UNEs "belies any suggestion that the lack of unbundling makes entry uneconomic").

competitive platforms such as cable that have their own networks and access to the rights-of-way.[17]

B. The Commission Should Not Find That Carriers Are Impaired by Virtue of State Social Pricing Policies.

BellSouth agrees with those commenters who believe that the Commission should not find impairment by virtue of the implicit subsidies resulting from the social pricing of telephone services.[18] Such subsidies are unrelated to whether there are structural barriers to deploying particular network facilities or whether competitors can reasonably duplicate such facilities, which, as the D.C. Circuit has made clear, must be the hallmark of any impairment analysis.[19]

Although some commenters argue otherwise, their positions cannot be taken seriously. For example, while insisting that the Commission's consideration of "retail rates below historic costs" is "proper," the Loop and Transport CLEC Coalition ("CLEC Coalition") does not attempt to explain how social pricing has anything to do with natural monopoly barriers to competition, which is the analysis the D.C. Circuit directed the Commission to conduct.[20] The same flaw undermines Sprint's recommendation that the Commission's impairment analysis should "consider record evidence on the existence and impact of any lingering implicit subsidies on a location-specific basis;" there is no justification for the Commission to consider factors that

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[17] *Id.* at 572-73 (in conducting an impairment analysis, "the Commission cannot ignore intermodal alternatives").

[18] *See, e.g.,* AT&T Comments at 12; Verizon Comments at 28.

[19] *See USTA I,* 290 F.3d at 422 (when below-cost retail rates exist in certain markets, it cannot be said that the absence of unbundling would "impair competition in such markets, where, given the ILECs' regulatory hobbling, any competition will be wholly artificial"); *USTA II,* 359 F.3d at 573 (below-cost retail rates are unrelated to "structural features that would make competitive supply wasteful").

[20] CLEC Coalition Comments at 29-30.

impact impairment unless such factors are the result of a natural monopoly, which is not the case with respect to social pricing for telephone service.[21]

ALTS proposes that the Commission address the D.C. Circuit's concerns regarding social pricing (as well as competitive entry) by making a "modest" adjustment so that impairment would be found when "the effect may be to substantially lessen competition in the retail services that utilize the network element."[22] Such a change would hardly be "modest" but rather would require dramatically shifting the impairment analysis from an "uneconomic entry" standard to a "lessening competition" standard, which is used in evaluating corporate mergers under the federal antitrust laws. This dramatic shift would: (1) improperly focus on a competitive harm that has not necessarily materialized and may be entirely hypothetical; (2) fail to answer the concern expressed in *USTA II* about the Commission's impairment standard; and (3) create problems in conducting an impairment analysis that are greater than those ALTS's proposal is ostensibly intended to solve.[23]

IV. LOCAL CIRCUIT SWITCHING

A. Switching Alternatives Are Abundant.

The record is clear that competitive switches are numerous and that CLECs have been able to self-deploy circuit switches to provide service to their customers. In addition, facilities-based competition has grown through the use of packet switches, broadband loops, and wireless

[21] Sprint Comments at 21-23. As to Sprint's gratuitous suggestion that the Commission can effectively address "retail cross-subsidies" by adopting the proposal to reform intercarrier compensation and universal service offered by the Intercarrier Compensation Forum ("ICF"), this is hardly the proceeding for the Commission to consider the ICF's proposal. Indeed, it will take the Commission considerably longer to resolve issues surrounding universal service and intercarrier compensation than the time allotted to this proceeding.

[22] ALTS Comments at 7-8.

[23] *See* Banerjee Reply Declaration, ¶¶ 12, 15, 21, 25.

networks. As a result, ILECs are now losing substantial numbers of customer lines – and even greater shares of traffic and revenues – to cable, voice over Internet Protocol ("VoIP"), and wireless providers, which is fatal to CLEC claims that they are impaired without access to unbundled local circuit switching.[24] In fact, carriers such as AT&T and Sprint are deafeningly silent with respect to switching, which is an implicit acknowledgment that no impairment exists for unbundled switching.

A plethora of CLECs erroneously argue that the Commission should either disregard, or accord lesser weight, to the real intermodal competition that currently exists.[25] Such arguments range from claims that the Commission must narrowly focus on preserving wireline competition to suggestions that a cable versus wireline duopoly will result if unbundled access to local circuit switching is curtailed to assertions that wireless service has not yet blossomed into a mature wireline alternative. None of these arguments is persuasive.

Such arguments rest on the faulty premise that the D.C. Circuit blessed the Commission's approach in the *Triennial Review Order* to accord lesser weight to intermodal alternatives, which is simply not the case. The D.C. Circuit ruled that the Commission "cannot ignore intermodal alternatives," although it did not address the weight the Commission assigned to such alternatives, stating "[w]hether the weight the FCC assigns to this factor is reasonable in a given context is a question we need not decide."[26] Nonetheless, any approach that discounts intermodal competition because such competition is not open to those competitors seeking to offer a particular service or utilize a particular service would contravene the D.C. Circuit's

[24] *UNE Fact Report 2004,* at I-4.

[25] *See* Comments of MCI at 86-87, the PACE Coalition at 11, Dialog at 3, the National ALEC Association at 5-6, Momentum at 11, NTS at 11-13.

[26] *USTA II*, 359 F.3d at 572.

directive that any impairment analysis must be consistent with the goal of the 1996 Act, which is to "stimulate *competition* – preferably genuine, facilities-based competition."[27] Thus, in conducting its impairment analysis, the Commission must consider whether competition is impaired, not whether particular competitors are impaired, which requires that intermodal alternatives be given substantial weight in the process.[28]

That some intermodal alternatives may not be "mature" as compared to wireline telephone service is inconsequential. For example, despite any alleged lack of "maturity," cable is already a significant competitor in the telecommunications market, serving both residential and business customers. The availability of cable modem and other broadband service options has contributed to the exponential growth of VoIP, and already competitors such as AT&T and Vonage are reducing their prices in efforts to attract market share away from the ILECs.[29] Thus, while service provided by cable, VoIP, and wireless may not be as "mature" as traditional wireline service, they are already formidable competitors.[30]

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[27] *Id.* at 576 (emphasis added).

[28] The independent body of the New York State Department of Public Service ("NYDPS") apparently agrees; in its comments, NYDPS states the commission should recognize current market conditions by expressly placing substantial weight on intermodal competition. NYDPS Comments at 4-5.

[29] BellSouth Reply App. at 19.

[30] MCI's approach to intermodal competition is particularly egregious. MCI claims that intermodal competition is irrelevant to assessing impairment, and objected to producing any evidence concerning its packet switches in state proceedings. BellSouth Reply App. at 1. In its comments in this proceeding, MCI provides its total circuit switch count, but omits any mention of packet switches, claiming that technology advances will only result in benefits to residential customers "[t]en years from now." MCI Comments at 34. However, a cursory review of MCI's website tells an entirely different story. For example, MCI claims: it has "[t]he most rigorously engineered IP backbone network;" it has the most "robust set of converged communications services in the industry, including integrated voice, data, and Internet services;" its global IP network can circle the globe more than four times; it offers the fastest speeds available over IP today; its VoIP service – available since 2001 – was expanded in March 2004; and it is collaborating with Microsoft to provide VoIP services and integrate a PC and telephony solution as of May 2004. BellSouth Reply App. 10-11. Based on such statements, MCI's desire to avoid

Furthermore, any suggestion that intermodal alternatives should be discounted in assessing impairment because they are not available to business customers is misguided.[31] A number of intermodal providers, including "bring-your-own-access" VoIP providers, have actively entered the marketplace in recent months, targeting both residential and business customers. In addition, cable operators are aggressively deploying fiber to office buildings and extending their networks to business districts, and, as a result, a substantial percentage of business customers have selected cable as their telecommunications provider of choice.[32] This data provide compelling evidence of the depth and breadth of intermodal competition and requires that such competitive alternatives must be given substantial weight in assessing claims of impairment.[33]

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the Commission's consideration of intermodal alternatives appears to be driven more by economic self-interest rather than by any principled approach to impairment. Intermodal competition is robust enough that analysts anticipate most UNE-P lines will eventually transition to intermodal alternatives. BellSouth Reply App. at 13. Also, wireless carriers tout their all digital networks as offering exceptional quality. BellSouth Reply App. at 17-18.

[31] AT&T Comments at 76.

[32] *UNE Fact Report 2004*, I-7 & III-37 (noting industry studies that 41 percent of "enterprises," 32 percent of "middle market" businesses, and 44 percent of small business were using cable service in their main offices for some high-capacity services); Tipton Reply Affidavit, ¶¶ 4-5.

[33] As a final effort to derail a fair evaluation of intermodal alternatives, certain commenters attacked the quality and ability to relay emergency information through 911 of certain intermodal alternatives. *E.g.* MCI Comments at 102. These attacks also must fail and are readily dispelled through a cursory review of recent trade releases and CLEC websites. For instance, MCI announced on August 3, 2004, that its MCI Advantage product "is one of the industry's first Voice over Internet Protocol (VoIP) solutions to support 9-1-1 capabilities at fixed locations." BellSouth Reply App. at 11. MCI touted its abilities, explaining that "[w]e are able to offer MCI Advantage customers, who order service for fixed locations, the same benefits they would expect from their traditional phone service." *Id.* Cbeyond makes similar claims about the E911 capabilities of its private IP network. *Id.* at 16.

B. The Commission Should Reject Any Switching Threshold Test.

Several parties propose a "threshold" test to switching, with the threshold ranging from 150 CLEC lines per wire center to 3,500 CLEC lines per wire center.[34] Under these proposals, until the specified threshold has been reached, it purportedly is uneconomic to self-provide switching, and ILECs should continue to be required to provide local switching on an unbundled basis. There is no reason for the Commission to adopt such thresholds proposals because: (1) the abundance of competitive switches and the existence of intermodal alternatives provide dispositive evidence that competitive entry is economic without unbundled switching; (2) they are inconsistent with *USTA II;* and (3) they are not grounded in, let alone supported by any facts.

The question of whether an efficient CLEC can enter a market and compete without unbundled local circuit switching is readily answered in the affirmative given the evidence of actual competition that exists in the marketplace. If actual carriers are competing successfully without access to unbundled switching, it must be true that an efficient CLEC could do likewise and thus competition is possible without unbundled switching. Because actual competition through self-provided circuit switches and intermodal alternatives demonstrates that competition is possible without unbundled switching, there is no impairment and thus no need to resort to any "threshold" test.

Indeed, the CLEC switching threshold proposals conveniently overlook that CLECs have already deployed a switch or have a switching presence in many of the same wire centers where they are purchasing unbundled switching from BellSouth as part of the UNE-P. These UNE-P

[34] To facilitate the Commission's review, BellSouth includes in its Reply Appendix at 20 its summary of the faulty threshold proposals in tabular format.

arrangements could readily be served using existing CLEC switching capabilities without meeting any threshold test.[35] Furthermore, the CLECs have known for some time that UNE-P was in legal jeopardy; they could and should have made alternative serving plans rather than waiting for some self-serving threshold to be met.

The CLECs' switching threshold proposals also run afoul of *USTA II.* By limiting the threshold consideration to the level of competition that currently exists, the threshold approach violates the D.C. Circuit's directive that impairment be assessed based on more than where there is actual competition, i.e., where competition is "possible." By limiting the threshold consideration to a particular CLEC, the threshold approach violates the requirement that impairment be assessed based on competition in generally, and not individual competitors.[36] Finally, by limiting the threshold consideration to a particular wire center, the threshold approach violates the requirement that the geographic market be defined "sensibly," since CLECs do not self-deploy switches to serve only a single wire center.[37]

Finally, by and large, the majority of "threshold proponents" fail to provide any data that would support their particular thresholds, and those that do so offer proposals that are carrier-

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[35] Tipton Reply Affidavit, ¶ 8.

[36] CompTel/ASCENT Alliance Comments at 45; PACE Coalition Comments at 84; NTS Comments at 20. As CompTel explains "the Commission should note that any non-impairment finding should properly be limited to the specific CLEC who has obtained sufficient market penetration to satisfy the 1500-line threshold." This qualification contradicts the Commission's view that it "will not, as some commenters urge, evaluate whether individual requesting carriers or carriers that pursue a particular business strategy are impaired without access to UNEs." *Triennial Review Order*, 18 FCC Rcd at 17056, ¶ 115.

[37] Unlike the CLEC switching threshold proposals, BellSouth's proposal that impairment for high capacity loops, transport and dark fiber be assessed based on the concentration of business lines in a particular wire center meets the requirements of *USTA II,* as discussed *infra* beginning at p. 23. BellSouth's proposal takes into account both actual and potential competition; assesses competition on a broad basis without regard to the effect on CLECs individually; and utilizes a "sensible" definition of the geographic market that conservatively reflects the manner in which CLECs self-deploy high-capacity facilities.

specific. Whatever data have been presented focuses upon evaluating impairment from the perspective of a specific CLEC, which this Commission and the D.C. Circuit has made clear is not the appropriate inquiry and is administratively unworkable.[38]

C. The Commission Should Reject Efforts to Apply Revised "Trigger" Tests.

Various commenting parties, most notably MCI, present this Commission with the alleged results of state impairment proceedings and focus on claimed shortcomings in the "trigger" analysis in an attempt to preserve continued access to unbundled local switching. Both MCI, the PACE Coalition, and others suggest that, by conducting a wholesale review of state records, the Commission can simply mend its trigger analysis by performing each of the previously delegated tasks itself. Following such an approach would be legally indefensible, particularly when the Commission's trigger tests cannot be reconciled with *USTA II*.[39]

By definition, the trigger tests represent an actual competition standard; by mandating the presence of multiple competitors in a particular market, the trigger tests require that the market be fully competitive before there is a finding of no impairment. However, in *USTA II* the D.C. Circuit affirmed that the critical inquiry is not whether a market is fully competitive but rather

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[38] *See Triennial Review Order*, 18 FCC Rcd at 17057, ¶ 115 (noting that "a carrier- or business plan-specific approach would be administratively unworkable for regulators, incumbent LECs, and new entrants alike because it would require case-by-case determinations of impairment and continuous monitoring of the competitive situation").

[39] There are a host of problems with MCI's attempt to have the Commission make a decision based on its summary of state impairment proceedings. As a preliminary matter, none of the state commissions in BellSouth's region completed its impairment proceeding and adopted formal findings based on the evidence presented; indeed, the Florida Commission recently closed its docket and opted not to file a summary with this Commission. BellSouth Reply App. at 6. And, MCI's analysis is premised upon the applicable market being defined as a wire center, even though CLECs do not make entry decisions about switching at a wire center level. BellSouth Reply App. at 2. Rather, CLECs typically advertise on a much broader scale, and CLECs' switch architecture can serve a wide-ranging geographic area that vastly exceeds the boundaries of a single wire center. Tipton Reply Affidavit, ¶¶ 7-9.

whether CLECs are capable of competing without UNEs – that is, whether "competition is possible" without UNEs in a particular market.[40] Since the impairment standard does not encompass an "actual competition" test, the Commission could not apply such a test as the prerequisite for a non-impairment finding, which would be the case under the Commission's trigger analysis.[41]

Furthermore, even assuming a trigger test approach was lawful, which is not the case, the triggers are and continue to be subject to such manipulation that the tests have been rendered essentially useless. This is illustrated by MCI's proposal to add new criteria to the Commission's now vacated triggers analysis; namely, that a CLEC must achieve a percentage market share in a given market before qualifying as a trigger.[42] How would the market be defined? How would the total service in the market be determined? How would any particular CLEC's share of that market be calculated? MCI never says, which is yet another example of CLECs' twisting an ostensibly "bright-line" test into a quagmire that cannot be navigated.[43]

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[40] *USTA II*, 359 F3d. at 575; *see also id.* at 571 (issue in conducting impairment analysis is "whether a market is suitable for competitive supply").

[41] Several CLECs also propose that the Commission apply its trigger tests in assessing impairment for purposes of high-capacity facilities. The Commission's trigger tests cannot be lawfully utilized in analyzing impairment regardless of whether the UNE in question is switching or high-capacity loops, transport and dark fiber.

[42] MCI Comments at 114.

[43] CLEC manipulation of the Commission's trigger tests was not limited to switching. For example, in the state impairment proceedings, CLECs insisted that the Commission's self-provisioning triggers for high-capacity loops applied to individual customer locations within a multi-tenant building. Under this approach, an individual end user would have to be served by two or more competing providers in order for the trigger to apply, in which case unbundling relief would only extend to that particular end user, which is a nonsensical result. Padgett Reply Affidavit, ¶ 24. Likewise, the CLECs sought (and continue to seek) to impose a requirement of "operational readiness" on each trigger candidate that could not reasonably be met under the best of circumstances. *See* Alpheus Comments at 51-56; Padgett Reply Affidavit, ¶ 25.

D. The Commission Should Reject Proposed Rural Area "Carve Outs."

CLECs also seek continued access to unbundled local switching in certain rural areas. Similar to other threshold proposals, however, these claimed "rural exemptions" are not based on any objective data. Moreover, in many instances, CLECs that seek this "niche" protection offer as support a claimed business plan that is geared toward a certain customer segment alone. These CLECs disregard that this Commission has already explained that, even under an economic impairment analysis, it must assume a carrier will broadly serve customers.[44] Furthermore, there is no dispute that the current generation of switches can serve broad geographic markets, and a CLEC is not impaired simply because its business plan involves serving only a limited geographic area or only a particular segment of the market.

E. The Commission Should Reject CLEC Attempts to Segment the "Mass-Market."

The Commission can and should reject those claims by commenters' seeking to partition the impairment analysis into gerrymandered markets, such as proposals that the Commission conduct a separate residential impairment analysis. Such proposals are premised upon the historic universal service subsidies inherent in below-cost residential rates, which, as explained above, is not a valid consideration for impairment purposes.

In addition, while commenters claim the sky will fall if residential customers can no longer order services made possible by artificial competition, such claims discard entirely the fact that BellSouth will provide local circuit switching to competitors even in the absence of

[44] Specifically, the Commission explained "[w]e consider *all* the revenue opportunities that a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell." *Triennial Review Order,* 18 FCC Rcd at 17047, ¶ 100 (emphasis in original). Further, the Commission noted "[i]n our impairment analysis, we examine both whether new entrants can provide retail services over non-incumbent facilities and whether new entrants can provide wholesale services over non-incumbent facilities." *Id.,* ¶ 101.

unbundling – albeit under commercial rates, terms, and conditions. To date, BellSouth has reached 22 agreements to provide switching on a commercial basis and other carriers can avail themselves of similar arrangements, if they choose to do so.[45] Moreover, those carriers that desire to engage in niche residential or rural service offerings can do so utilizing an alternative that does not run afoul of a proper impairment inquiry and that does not inflict negative unbundling costs upon the industry.[46]

F. The Commission Should Reject Attempts to Perpetuate Access to Unbundled Local Circuit Switching Under the Guise of a Lengthy Transitional Mechanism.

In addition to self-serving threshold tests, many CLECs claim a need for UNE-P as an entry strategy or otherwise seek to maintain lengthy access to unbundled circuit switching.[47] The purported logic for these proposals is that, with time, carriers will eventually be able to economically self-provide switching. However, CLECs have already had ample time with which to build a customer base, and many CLECs have invested in their own switches. That some CLECs preferred to ignore the changing competitive landscape, and have made little or no effort

[45] Tipton Reply Affidavit, ¶ 13.

[46] As to the APCC's suggestion that the Commission engage in a specific analysis for CLECs seeking to provide service to payphone service providers, this Commission has already established the methodology by which it sets rates for payphone service providers ("PSPs"). In a series of orders, the Commission has explained payphone service providers can obtain cost-based rates based upon the new services test. *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, CC Docket Nos. 96-128 & 91-35, *Report and Order*, 11 FCC Rcd 20541 (1996); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, CC Docket Nos. 96-128 & 91-35, *Order on Reconsideration*, 11 FCC Rcd 21233 (1996); *Wisconsin Public Service Commission; Order Directing Filings,* Bureau/CPD No. 00-01, *Memorandum Opinion and Order*, 17 FCC Rcd. 2051 (2002), *aff'd New England Pub. Communications Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2065 (2004).

[47] *See* Reply App. at 20.

to self-deploy facilities or make other arrangements for switching is a self-created problem.[48] The fact that any *individual* CLEC may not yet have amassed a customer base sufficient in its own view to justify facilities is beside the point, since an evaluation of impairment must focus on competition generally, not individual competitors.[49]

Commenting parties also fail to adequately justify their repudiation of total service resale as a viable entry strategy to serve residential customers. For example, although ACN concedes that UNE-P margins generate over 35% profit margin,[50] it also admits its typical service arrangement using resale would "yield" $5.10. That UNE-P generates greater margins fails to justify continued access to unbundled local switching as an entry strategy.[51] Because CLECs will retain resale access to ILEC services and can also avail themselves of BellSouth's commercial switching offer notwithstanding any elimination of unbundled local circuit switching, there is no need to provide lengthy transition periods or to carve out unbundled access to UNE-P to further preserve CLEC profit margins.

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[48] Moreover, CLECs have a variety of switching options; next generation switches can cost as little as little as $100,000. BellSouth Reply App. at 14.

[49] ACN aptly illustrates the fallacy of the CLECs' arguments. On the first page of its Comments, ACN explains that it began providing local service in January 2003. One year later, in January 2004, ACN began utilizing UNE-P to provide local service in several BellSouth states. BellSouth Reply App. at 3. Both ACN's entry into the market and subsequent expansion occurred after the D.C. Circuit had vacated unbundled access to switching in its 2002 *USTA I* decision. To suggest, as ACN does, that additional access to switching is a needed entry strategy when it elected to launch its UNE-P offerings during a time of regulatory uncertainty is fanciful at best.

[50] ACN Comments at 9.

[51] *Iowa Utils. Bd.*, 525 U.S. at 389-90 (the Commission cannot give substance to the impairment standard by "regarding any increased cost or decreased service quality as establishing a necessity and an impairment of the ability to provide services").

G. The Commission Should Reject Attempts to Perpetuate Access to Unbundled Local Circuit Switching in the Name Of Competition.

As a final effort to preserve unbundled access to local circuit switching, several commenters and state commissions suggest that continued access to UNE-P will advance competition. The problems with such arguments are well documented in a Report to the U.S. Chamber of Commerce ("Report"),[52] which shows that administrative mandates under the 1996 Act have adversely impacted competition generally and the telecommunications industry specifically. Thus, the cruel irony resulting from the current unbundling regime is that – despite any artificial competition that has resulted – the Report suggests that regulatory reform and less reliance on network sharing would yield far greater benefits to the overall economy. Given that Congress originally thought the 1996 Act would provide for a "deregulatory national policy framework," would "accelerate rapidly private sector deployment of advanced telecommunications and information technologies," and would ensure the future growth of the *industry* domestically and internationally, pleas to preserve a regime that has had precisely the opposite effects must be rejected.

V. BELLSOUTH'S HOT CUT PROCESSES

A. BellSouth's Hot Cut Process Is Effective

BellSouth has an operational, effective and efficient hot cut process. No CLEC has credibly rebutted this fact. In fact, few CLECs even commented on hot cuts, and of those few, several mentioned batch hot cuts only in passing. Consequently, there are no grounds upon which the Commission can conclude that BellSouth's hot cut processes create unbundled switching impairment.

[52] BellSouth Reply App. at 5.

With respect to BellSouth's batch hot cut process, by which batches of loops are effectively transferred from one carrier's switch to another carrier's switch, BellSouth's process includes the majority of the components the CLECs claim are necessary. For example, AT&T advocates the use of project management. Project management is the cornerstone of BellSouth's batch process, which allows "project-managed, after-hours, bulk transfers of customers, on a central office and competitive carrier basis."[53]

The CLECs insist that a batch hot cut process must include IDLC, which BellSouth's process does. Furthermore, BellSouth employs eight different methods to provide loops provided via IDLC equipment on an unbundled basis to requesting CLECs.[54] There are, therefore, no loops in BellSouth's network that cannot be provided on an unbundled basis.[55]

The CLECs also argue that a batch hot cut process should include migrations to a third party switch, which BellSouth's process does. At the request of AT&T, BellSouth revised the batch hot cut process to include third party migrations.[56]

CLECs also want certainty in cutover time, which BellSouth's process provides. BellSouth's process provides that coordinated cutovers will be completed within a four-hour time window, either 8 AM-12 PM, or 1 PM-5 PM, at the customer's request. In addition, BellSouth's process includes after-hours cutovers, which allow the CLEC to select specific

[53] Ainsworth Reply Affidavit, ¶ 8.

[54] *Id.*, ¶¶ 13, 14.

[55] To manage effectively the conversion of loops provided over IDLC, BellSouth reasonably limits the number of IDLC conversions performed during a day. The limitation is reasonable in that migrations of lines involving IDLC facilities require an outside dispatch on the due date to perform the conversion. Ainsworth Reply Affidavit, ¶¶ 8, 16. The maximum number of hot cuts involving IDLC equipment in BellSouth's process is 70 per day per central office; which translates into the ability to perform approximately 112,000 IDLC conversions across BellSouth's region in any given day. *Id.*, ¶ 14. AT&T has presented no evidence to demonstrate that this limitation is unreasonable.

[56] *Id.*, ¶ 23.

accounts within the batch to be converted within a 1, 2, 5, or 8-hour window of time outside of the BellSouth normal business hours.[57]

MCI states that a batch hot cut process must have a reasonable cutover interval, which BellSouth's process does. Currently, BellSouth's interval is 15 days for batch migrations, decreasing to 8 business days on October 29, 2004.[58] Both the 15-day and the 8-day interval are reasonable in that the batch process is designed to migrate UNE-P customers to UNE-L. Thus, the end-user already is a CLEC customer – it is simply a matter of migrating that end-user to a different service offering by the same CLEC provider. The batch scenario, therefore, is different than the individual hot cut scenario in which the CLEC most likely is winning the customer from the ILEC for the first time and thus speed of conversion is essential.

AT&T argues that a batch process must include "all migrations."[59] BellSouth's process includes a variety of migrations from one carrier's switch to another carrier's switch.[60] Moreover, while BellSouth's process does not include every loop type, it does include each of the loop types commonly used in the mass market. For example, while the batch process does not include High bit-rate Digital Subscriber Line capable loops, it is extremely unlikely that any CLEC would have a quantity of mass-market customers in a single central office each

[57] Ainsworth Reply Affidavit, ¶¶ 27, 29. The use of the four-hour window during business hours balances the realities of a batch hot cut (which can include hundreds of lines) with the customer's need for certainty. While AT&T argues that it needs a specific time commitment for each loop, (Declaration of John S. Sczepanski, Mark David Van de Water and Sharon E. Norris on Behalf of AT&T Corp., ¶ 18 ("Sczepanski Declaration")), this solution is neither practical nor efficient. It is far more effective to allow a technician to process a group of orders in whatever order is fastest than encumbering technicians with an overly detailed timetable. In addition, coordination of the time and migration sequence to the level sought by AT&T would add cost to the process in the form of added work steps and additional network personnel. Ainsworth Reply Affidavit, ¶ 28.

[58] Ainsworth Reply Affidavit, ¶ 32.

[59] *See* Sczepanski Declaration, ¶ 53.

[60] Ainsworth Reply Affidavit, ¶ 34.

purchasing this loop type so as to make the use of the batch hot cut process efficient for cutting over this type of loop. Indeed, no CLEC has presented evidence of a batch of loops it wanted to convert that BellSouth cannot accommodate.

BellSouth also provides, as the CLECs advocate, timely and informative cutover notifications and includes a throwback process that allows BellSouth to restore a customer to BellSouth's switch in the event there is a problem with the cutover. BellSouth's notification methods in the batch hot cut process allow CLECs to monitor, track, and verify their batch hot cut orders and to take corrective action promptly in response to problems that might arise during the process. The throwback process is based on the opportunity that CLECs have to test and either accept or turn back the loop and allows a CLEC to request a throwback within 24 hours of the UNE-L due date. [61]

The few components advocated by the CLECs that BellSouth's batch hot cut process does not include are not unnecessary. For example, AT&T argues that it needs the ability to sequence the cutovers in a batch migration. However, the batch hot cut process is intended to move large volumes of lines to UNE-L quickly and efficiently. Sequencing, like time-specific hot cuts, would add unnecessary cost and decrease the efficiencies gained by batching the orders. Individual accounts with special dialing patterns such as hunting may best be served by utilizing BellSouth's project management process option rather than the batch hot cut process.[62]

B. BellSouth's Hot Cut Process Works

As BellSouth predicted in its initial comments, while the CLECs make unsubstantiated allegations about BellSouth's hot cut performance, they failed to produce credible data or, in

[61] *Id.*, ¶¶ 36-38, 40-41.

[62] *Id.*, ¶ 33.

most cases, any data at all to support such allegations. BellSouth's months and months of exemplary performance data stand in sharp contrast to AT&T's summary conclusions about a "limited" UNE-L trial it conducted more than **six** years ago. Moreover, BellSouth's 98% on-time due date performance on Supra's cutovers stands in sharp contrast to Supra's unsubstantiated rhetoric about BellSouth's process.[63]

BellSouth also engaged PriceWaterhouseCoopers ("PwC") to perform a robust third-party test of its batch hot cut process to bolster the extensive commercial usage of its individual hot cut process, which specifically tested "whether the process work[s] as described in the ILEC's oral and written representations" as advocated by AT&T.[64] AT&T's argument that BellSouth's process is deficient because PwC failed to make a qualitative judgment about the process loses sight of the fact that, in this case, it is the Commission that makes the qualitative judgment about the appropriateness of the process – the auditors are engaged to verify that the process works, which PwC did in this case.[65]

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[63] *Id.*, ¶¶ 54-57, 59.

[64] *See* Sczepanski Declaration, ¶ 87; Ainsworth Reply Affidavit, ¶ 61.

[65] Ainsworth Reply Affidavit, ¶ 61. AT&T's further criticisms of the PwC test also are meritless. For example, AT&T questions the independency of PwC, even though PwC provides services to 82% of the Fortune Global 500 and has performed attestation services for AT&T itself. Ainsworth Reply Affidavit, ¶ 62-63 (citing Deposition of Paul Gaynor at 15) ("I've given attestations for AT&T") (excerpts of Mr. Gaynor's deposition are included in BellSouth's Reply App. at 12) (also citing Deposition of Mark Van de Water; the relevant page is included in BellSouth's Reply App. at 15). Likewise, while AT&T claims that the PwC test is invalid because BellSouth changed the process after the test had begun, Sczepanski Declaration, ¶ 106, BellSouth changed the process in large part to fulfill the requests of AT&T. AT&T also tries to discredit the PwC test by claiming that PwC did not explain "when and over what period of time the pre-wiring (the most time-intensive part of the hot cut) was completed" and did not provide "information regarding how the non-hot cut central office was handled." Sczepanski Declaration, ¶ 108. However, both of these issues were adequately explained when AT&T deposed a representative of PwC, and it is unclear why AT&T is raising the same issues here as if that deposition had never taken place. Ainsworth Reply Affidavit, ¶ 74; BellSouth Reply App. at 12.

Although AT&T points to certain deviations PwC noted during the test,[66] these deviations had no material impact on customers or on BellSouth's overall performance in the test. For example, although one deviation noted that BellSouth missed one step in the process on six telephone numbers, all six conversions were completed successfully. Similarly, another deviation noted that the BellSouth central office technician did not completely follow the process for one of 724 bulk hot cuts, but even as to the one cut in question, it was completed successfully with the correct telephone number. In short, despite the few immaterial deviations, PwC concluded that the test validated the sufficiency of BellSouth's process.[67]

C. BellSouth Has Robust Performance Measurements for Its Hot Cut Process.

To ensure on-going performance quality, BellSouth has both existing and proposed hot cut measures. BellSouth currently has in place four measures specific to hot cuts that include cutovers made in the batch process. In addition, BellSouth has proposed two new hot cut measures to capture hot cut components that are unique to batch hot cuts. BellSouth also has proposed to its state commissions to modify four of the ordering measurements to include, rather than exclude, project managed hot cuts.[68] Of the thirteen measures AT&T recommends,[69] nine

[66] Sczepanski Declaration, ¶¶ 108-09.

[67] Ainsworth Reply Affidavit, ¶¶ 73, 70, 69, 64. In lieu of the robust test BellSouth already conducted, AT&T asks the Commission to require a second test, which is excessively burdensome and unnecessary. BellSouth's test covered the key goals advocated by AT&T and was based on "pseudo testimony and commercial deployment using actual customer accounts" as AT&T urges. The only substantive difference between the PwC test and the test envisioned by AT&T is that the latter would take place over period lasting six months to a year. Thus, AT&T wants a test that would take longer, would cost more, and would overly burden BellSouth's workforce, even though it would not lead to any more credible results than the robust test PwC already has completed. Ainsworth Reply Affidavit, ¶¶ 75-80.

[68] *Id.*, ¶¶ 81-104, 87-88, 91, 93-102.

[69] *See* Sczepanski Declaration, ¶ 199.

are already covered in BellSouth's measurements and the remaining four fail to capture any meaningful data.

D. BellSouth's Batch Hot Cut Rate Is Reasonable.

The rate for BellSouth's batch hot cut process is a 10% discount off of the applicable nonrecurring rate of the loop to account for the efficiencies gained by using the batch process.[70] BellSouth's nonrecurring rates were set by its nine state public service commissions, and such rates are the same as or lower than the rates this Commission approved in BellSouth's 271 applications.

AT&T's challenge to the hot cut rates on the grounds that the hot cut rates are higher than UNE-P rates is a red herring.[71] Provisioning a UNE-P does not require physical work – provisioning a UNE-L does. The cost difference between the two is as simple as that. The state commissions already considered and accounted for the differences in the two processes when they established BellSouth's nonrecurring rates.[72]

VI. HIGH-CAPACITY TRANSPORT, LOOPS, AND DARK FIBER

A. Competitive High Capacity Alternatives Are Abundant.

There is no serious dispute that the level of competitive high-capacity facilities is extensive and continues to grow. The route miles of fiber optic cable comprising CLEC networks in the United States increased by more than 80% in the past two years.[73] Likewise, the

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[70] Ainsworth Reply Affidavit, ¶¶ 105-06.

[71] *See* Sczepanski Declaration, ¶ 184.

[72] Ainsworth Reply Affidavit, ¶ 109.

[73] Compare *UNE Fact Report 2002* at I-1, Table 1 (noting that as of year-end 2001, CLECs had deployed at least 184,000 route miles of high-capacity facilities), with *UNE Fact Report 2004* at I-2, Table 1 (noting that as of year-end 2003, CLEC networks consisted of 324,000 route miles of high-capacity facilities).

average number of CLEC networks in the top 50 MSAs increased by approximately 30% during the same time period.[74] Thus, claims that CLECs are universally "impaired" without access to unbundled high-capacity loops, transport, and dark fiber are simply not credible.

Some parties seek to brush away such extensive competitive deployment, arguing that it was "uneconomic" and is merely a vestige of an earlier time, which they say proves nothing about impairment.[75] Besides being unsubstantiated by any facts, such arguments ignore that competitive fiber deployment continues to this day.[76] Indeed, AT&T's network has increased by 2,500 local route miles in the past two years alone.[77]

Furthermore, regardless of when such facilities were deployed, CLECs concede that they are self-providing high-capacity transport to a significant degree. For example, Advanced Telecom notes that the majority of its high-capacity transport facilities are self-provided,[78] while KMC self-provides high capacity transport from its switches to at least three (3) ILEC central offices in *each of the 35 metropolitan areas* in which it operates a network.[79] Other CLECs

[74] Compare *UNE Fact Report 2002* at I-1, Table 1 (noting that as of year-end 2001, there were an average of 16 CLEC networks in the top 100 MSAs), with *UNE Fact Report 2004* at I-2, Table 1 (noting that as of year-end 2003, there were an average of 19 CLEC networks in the top 50 MSAs).

[75] *See, e.g.*, AT&T Comments, at 18, 63 (referring to competitive fiber deployment as being the result of a "build it and they will come" strategy that was unsuccessful).

[76] *See UNE Fact Report 2004* at III-3, n.8 (noting that of those CLECs reporting the number of buildings served directly on their networks for the past two years, four reported increases in the number of buildings served, one of which – Time Warner Telecom – added 313 buildings).

[77] *Id.*

[78] Declaration of Dan J. Wigger on Behalf of Advanced Telecom, Inc., ¶ 33 ("Wigger Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition.

[79] Declaration of Mike Duke on Behalf of KMC Telecom Holdings, Inc., ¶ 7 ("Duke Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition.

acknowledge that high-capacity transport facilities are readily available from carriers other than the incumbent.[80]

The evidence also establishes that CLECs are self-providing high-capacity loop facilities or obtaining such facilities from other CLECs.[81] This evidence is consistent with BellSouth's experience and market research, which reflects that CLECs have a substantial percentage of the high capacity loop market in BellSouth's region.

[BEGIN PROPRIETARY DATA]

[80] *See, e.g.,* Declaration of Rebecca H. Sommi on Behalf of Broadview Networks, Inc., ¶ 8 ("Sommi Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition (Broadview Networks is able to obtain transport from alternate vendors a substantial percentage of the time); Declaration of David A. Kunde, Eschelon Telecom, Inc., ¶ 6 ("Kunde Declaration"), submitted with Initial Comments of the Loop and Transport CLEC Coalition (a majority of Eschelon collocation arrangements can be served via alternative transport providers); Declaration of Warren Brasselle on Behalf of Talk America Inc., ¶ 10 ("Brasselle Declaration") (Talk America is able to purchase interoffice transport from other CLECs on a substantial percentage of its system routes).

[81] *See, e.g.,* Wigger Declaration, ¶¶ 18-19 (noting commercial buildings served by Advanced Telecom's "own loops facilities"); Declaration of Mark A. Jenn, ¶ 9 ("Jenn Declaration"), submitted with Comments of ATX/Blackfoot (noting that TDS has found evidence of carriers offering wholesale access to loop facilities in downtown areas of major metropolitan areas); Wengert Declaration, ¶ 10 (acknowledging that BayRing has self-provisioned its own DS-1 and DS-3 loops); *see also UNE Fact Report 2004* at III-3 (noting that "[m]any CLECs acknowledge that they now serve a significant percentage of their customers entirely over their own facilities").

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